88-1 98

No. .....

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States
October Term, 1988

SEQUOIA BOOKS, INC.,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTIONS PRESENTED

1. Whether a search warrant document, resulting in the seizure of a large number of different magazines, is constitutionally sufficient where probable cause for obscenity is tied to the depiction of a single sexual act.

2. Whether a prior adversary hearing is constitutionally required when a search warrant authorizes the confiscation of an unlimited number of magazines, which are purportedly obscene because they contain a depiction of a single sexual act.

3. Whether a search warrant which predetermined obscenity and authorized executing officers to take any magazine that contained a depiction of a single sexual act is a constitutionally invalid general warrant.

4. Whether the procedure of combining a large number of magazines into a single count complaint, and the use of a general verdict form with accompanying special interrogatory, is constitutionally permissible.

5. Whether the failure of the Illinois Obscenity Statute to define the element of prurient interest renders said statute fatally overbroad under the First Amendment to the Constitution of the United States.

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SEQUOIA BOOKS, INC.[1],

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vs.

STATE OF ILINOIS,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

—o—

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgment and unpublished opinion of the Appellate Court of the State of Illinois, Second District, entered on March 9, 1988.

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[1] There are no parent companies, subsidiaries, or affiliates of the corporation.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, was an order pursuant to Illinois Supreme Court Rule 23 and thus, was an unpublished order with no precedential value. A copy of this order is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Appellate Court for the Second District.

A written opinion and order was issued by the Appellate Court on March 9, 1988. A timely filed Petition for Leave to Appeal to the Illinois Supreme Court was denied on June 27, 1988, a copy of which denial is included in the Appendix as Exhibit B. The petitioner filed an Affidavit of Intent to Seek Review in the United States Supreme Court and a Motion to Stay the Mandate with the Illinois Supreme Court. On June 14, 1988, the motion to stay was granted, and a copy of the order staying the mandate is included in the Appendix as Exhibit C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and the Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev.Stat. (1985), and as revised effective January 1, 1986, are set forth in the Appendix as Exhibits D and E.

STATEMENT OF THE CASE

The petitioner in this case is Sequoia Books, Inc., the corporate owner and operator of the Denmark Bookstore, an adult bookstore located at 1300 Business 30 West, Aurora, Illinois. This bookstore sells sexually explicit materials to adults over the age of 18 years and admittance to the bookstore is restricted.

On May 9, 1986, a Yorkville City Police Officer, Gregory Sibenaller, entered petitioner's business premises and purchased three magazines. On the same day, he presented those magazines along with a complaint for search warrant, and in an accompanying affidavit, Sibenaller indicated that he had observed depictions of sexual acts in several hundred magazines while browsing at the store. Illinois Circuit Judge Michael O'Brien issued a search warrant which authorized the search of the Denmark Bookstore and the seizure of magazines containing "depictions or portions thereof" of enumerated acts of sexual intercourse.

On May 9, 1986, the warrant was executed and a search was conducted at the bookstore premises. A total of 166 magazines were seized by several law enforcement officers. The seizure of each magazine was accomplished by a review of the cover and/or a few pages inside the magazines for 30 seconds to a minute. No reference was made at any time by the executing officers to the Illinois Obscenity Statute or the tripartite test for obscenity, and instead, they were guided solely by the language of the warrant which authorized the seizure of a magazine which contained a depiction of one of the enumerated acts.

On May 13, 1986, a one-count criminal complaint was filed which alleged that Sequoia Books, Inc., d/b/a Denmark II, had committed the offense of obscenity in violation of Ch. 38, § 11-20, Ill.Rev.Stat. (1985), by offering obscene magazines for sale. The single count complaint incorporated by reference a list of 166 magazines seized the search warrant procedure.

The defendant pleaded not guilty and filed a pre-trial motion to quash the search warrant, suppress evidence, and order return of the items seized as being taken in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States. This motion was denied after an evidentiary hearing.

The defendant also filed a motion to dismiss alleging that the Illinois Obscenity Statute was unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, and that the complaint improperly allowed the joinder of 166 separate items in a single-count charging obscenity. After hearing and argument this motion was also denied.

The cause was called for a jury trial. The jury was instructed that if they found any one magazine to be obscene they should find the defendant guilty. In addition to a general verdict the jury was also tendered a special interrogatory in which they were asked to designate "yes" or "no" on each of the 166 magazines on the list attached to the complaint. The defendant's tendered instructions which would require the jury to find all charged magazines obscene before the defendant could be found guilty was rejected.

The jury returned a verdict of guilty and the defendant's timely filed post-trial motion was denied. The defendant was sentenced to pay a fine and costs.

On appeal before the Second District Appellate Court the defendant questioned the constitutional validity of the search and seizure procedure, the Illinois Obscenity Statute for its failure to define "prurient interest", and the joinder of the 166 magazines in a single-count complaint. In an unpublished order entered March 9, 1988, Second District Appellate Court rejected all of the arguments raised by the petitioner. In doing so the court relied on its previous opinions addressing these or similar issues, e.g. *People v. Sequoia Books, Inc.*, 160 Ill.App.3d 315, 513 N.E.2d 468 (1987) (cert. pending No. 87-1646).

Following the June 3, 1988, denial of leave to appeal by the Illinois Supreme Court petitioner seeks certiorari review.

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REASONS FOR GRANTING THE WRIT

I.

THE GENERAL WARRANTS USED IN THIS CASE PROVIDED NO SEARCHING FOCUS ON THE ISSUE OF OBSCENITY OF THE MAGAZINES TO BE SEIZED, AND THE SEIZURE PROCEDURE AMOUNTED TO A PRIOR RESTRAINT.

Two cases are presently pending before this Court in which the present petitioner, Sequoia Books, Inc., has sought review of the system of prior restraint that has been embodied in the massive search and seizure proce-

dures utilized by Kendall County, Illinois authorities. See *Sequoia Books, Inc. v. Illinois,* No. 87-1646, and No. 87-1975. While this Court has consistently rejected the constitutional validity of the large scale search and seizure procedures where First Amendment interests are involved, see *Marcus v. Search Warrants of Property,* 367 U.S. 717 (1961); *A Quantity of Copies of Books v. State of Kansas,* 378 U.S. 205 (1964); *Standford v. Texas,* 379 U.S. 476 (1965); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968); *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973), the situation in Kendall County, Illinois, demonstrates that certain law enforcement officials pay no heed or are completely unconcerned about the scenario the massive seizure presents. Despite this Court's recent affirmation of fundamental constitutional principles applicable in such search and seizure cases in *Lo-Ji Sales Inc. v. New York,* 442 U.S. 319 (1979), and *Maryland v. Macon,* 472 U.S. 463 (1985), the repeated use of a broad search warrant and large scale seizure of a large number of books is evident.

In *New York v. P. J. Video,* 475 U.S. 868 (1986), this Court restated the long-standing requirement of special conditions where seizures involve First Amendment principles. In *P. J. Video,* the Court approved a search and seizure procedure which was conducted at a bookstore, but only upon the finding that the procedure permitted a searching focus on the issue of obscenity vel non of each of the items of material that was to be seized. The Court concluded in that case the affidavits attached to a search warrant provided a factual basis, utilizing a standard of probable cause, to focus on the issue of obscenity as to the specific materials that were ultimately seized.

In Kendall County, none of the fundamental constitutional requirements found in the decisions of this Court are applied. The search warrant documents pay lip service to the concept of obscenity, but a complaint and affidavit do not establish probable cause that materials that have not been reviewed and are about to be seized are, in fact, obscene. Of course, just because a magazine may have a depiction of a single sexual act will not meet a probable cause standard that the three components of the tripartite test of *Miller v. California,* 413 U.S. 15 (1973), have been met. Nor had the judge who issued the warrant ever had an opportunity to apply the test for obscenity to any of the 166 magazines that were seized in this case.

Purely and simply, a system of prior restraint is in place in Kendall County, Illinois. The discretion given to seize the quantity of materials, and the nature of the materials that are seized, are given completely to police officers on the basis of a review of the cover and/or a few pages inside a magazine. With a 166 items being taken, this Court's holdings in *Marcus, Quantity,* and *Lo-Ji Sales* which require a prior adversary hearing come into place. With no prior adversary hearing the search and seizure process utilized in this case is constitutionally invalid.

The Second District Appellate Court in its unpublished order in this case and in other cases have ignored this Court's historical condemnation of general warrants in search and seizure procedures with First Amendment effect. The Appellate Court has ignored decisions of other circuits, *United States v. Guarino,* 729 F.2d 864 (1st Cir. 1984), and *United States v. Tupler,* 564 F.2d 1294 (9th Cir. 1977), and is in direct conflict with them. Just as in

the pending petitions filed by the petitioner, this Court should acknowledge the significance of the constitutional issues presented by this case and grant certiorari.

II.

A SINGLE-COUNT COMPLAINT CHARGING A 166 ITEMS AND PERMITTING A CONVICTION THROUGH THE USE OF A GENERAL VERDICT WITH A SPECIAL INTERROGATORY, IS A SYSTEM OF PRIOR RESTRAINT.

This case again presents the issue of a joinder of a large number of communicative items in a single-count obscenity complaint. That issue is currently pending before the Court in *Sequoia Books, Inc. v. Illinois,* No. 87-1646 and No. 87-1975. In this case, a 166 magazines were included under one count.

This Court has condemned the practice of joining protected and unprotected conduct in a single-count complaint. Such was the holding of the Court in *Street v. New York,* 394 U.S. 576 (1969). There the defendant was charged with a single count violation of desecrating a flag by burning it and by his oral statements. In reversing the defendant's conviction, the Court stated:

> [W]hen a single count indictment or information charges the commission of a crime by virtue of the defendants having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together . . . (omitting citations). There is no comparable hazard when in the indictment or information is in several counts and the conviction is explicitly declared to rest on findings

> of guilty on certain of those counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others.
>
> 394 U.S. at 588 (footnote omitted)

See also, *Eaton v. City of Tulsa,* 415 U.S. 697 (1974).

The procedure utilized in this, and in other Kendall County cases, of a single count obscenity complaint, presents no meaningful scrutiny to determine the protected from the unprotected. It is difficult, if not impossible, to adjudge one magazine from the next. Not surprisingly, the use of special interrogatories in criminal cases is not a practice which receives the approval of court. *United States v. Jackson,* 542 F.2d 403 (7th Cir. 1976); *United States v. Spock,* 416 F.2d 165 (1st Cir. 1969), but see, *Heald v. Mullaney,* 505 F.2d 1241 (1st Cir. 1974), which appears to be in conflict.

Each and every magazine in the present case was entitled to a specific and separate consideration apart from the other magazines. There could be no assurance where a general verdict is used, that 12 jurors actually unanimously agreed upon the obscenity of any one of the magazines determined to be obscene. One cannot conclude that the general verdict and special interrogatory forms are the type of "sensitive tools" necessary to separate protected from unprotected speech. See *Speiser v. Randall,* 357 U.S. 513 (1958). The Court is again requested to grant certiorari and address the conflicting, and significant issue of special interrogatories in criminal obscenity cases.

III.

THE ILLINOIS OBSCENITY STATUTE IS UNCONSTITUTIONAL FOR ITS FAILURE TO DEFINE PRURIENT INTEREST.

The Illinois Obscenity Statute, as amended effective January 1, 1986, defined obscenity as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.
>
> Ill.Rev.Stat., Ch. 38, § 11-20(b) (1987).

Prior to the amendments to the Illinois Obscenity Statute, effective January 1, 1986, that statute defined prurient interest as a "shameful or morbid interest in nudity, sex or excretion." See Ch. 38, § 11-20(b), Ill.Rev.Stat. (1983). The amendments, however, dropped out the definition of appeal to prurient interest thereby rendering the amended statute unconstitutionally vague and overbroad.

Recently this Court in *Brockett v. Spokane Arcades,* 472 U.S. 491, 105 S.Ct. 2795 (1985), recognizes special problems with the term "prurient interest" and its susceptibility to varying definitions. In striking down as unconstitutional the statutory definition of "prurient interest" that included appeal to "lust" this Court pointed out the danger in a statute with such a broad sweep. For ma-

terial which would appeal to the average adults normal curiosity about sex could fall within the purview of a statute which did not properly define prurient interest thus, including constitutionally protected speech under a statute's prescription. It is submitted the same risk is present in the amended obscenity statute under scrutiny in this case.

Because of its conflict with the decision in *Brockett v. Spokane Arcades,* this Court should reject the holding of the Illinois Appellate Court in its unpublished opinion saving the Illinois Obscenity Statute despite its failure of definition of "prurient interest" as being violative of the First and Fourteenth Amendments to the Constitution of the United States.

———o———

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and order of the Appellate Court of the State of Illinois, Second District, because of the significant issues presented under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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July, 1988.

EXHIBIT A

No. 2-87-0053

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	No. 86 CM 104
v.	)	
SEQUOIA BOOKS, INC.,	)	Honorable Wilson Burnell, Judge
Defendant-Appellant.	)	Presiding.

(Filed Mar. 9, 1988)

ORDER PURSUANT TO SUPREME COURT RULE 23

Following a jury trial, the defendant, Sequoia Books, Inc., was found guilty of the offense of obscenity (Ill. Rev. Stat. 1985, ch. 38, par. 11-20). Defendant was fined $1000 and ordered to pay court costs of $208. Defendant appeals.

On May 9, 1986, Judge Michael J. O'Brien issued a search warrant for the Denmark Bookstore in Aurora, Illinois, which was owned and operated by the defendant, to search for evidence of the offense of obscenity and to seize the following items:

> "Magazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, analingus, anal intercourse, excretion of semen from penis onto other

> persons, masturbation, vaginal or anal insertion of tongue into anus, and also depiction of male or female persons with genital or breasts being fettered, bound or otherwise physically restrained, insertions of objections [*sic*] into penis or anus."

Attached to the complaint for search warrant was the affidavit of Gregory Sibenaller, a police officer for the City of Yorkville. Sibenaller's affidavit set forth that he had visited defendant's bookstore and purchased three magazines entitled Anal Climax, No. 3, HOM Video, Number 1, and Pussy Polking. Each Magazine depicted more than one sexual act described in the search warrant. Sibenaller spent 30 minutes in the bookstore and observed several hundred magazines many, if not all of which, depicted acts described in the warrant. All of these magazines were offered for sale to the public.

Armed with the search warrant, Sibenaller, Glen Calvert, an investigator for the Kendall County State's Attorney's office, John Rob of the Kendall County sheriff's office, and other officers went to the Denmark Bookstore and seized 166 different magazines.

Defendant was charged by criminal complaint with the offense of obscenity, in that, defendant had offered obscene material for sale, incorporating by reference a list of the magazines seized pursuant to the search warrant. After pleading not guilty, defendant filed motions to quash the search warrant, suppress evidence, and for the return of the items seized, arguing that the search and seizure procedures violated the defendant's constitutional rights under the first, fourth, and fourteenth amendments to the United States Constitution. Following an evidentiary hearing, the motions were denied.

Defendant also filed motions to dismiss, contending *inter alia* that the complaints were improperly drawn, in that a large number of magazines had been included within a single count. The motion also contended that the recent amendment to the Illinois Obscenity Statute erroneously deleted the definition of "appeal to prurient interest." Following a hearing, the motion to dismiss was denied.

The case then proceeded to trial. The parties stipulated that the defendant owned and operated the Denmark Bookstore and offered the charged magazines for sale on the date in question, knowing the nature and contents of the magazines. The jury also heard testimony from the investigating officer regarding the seizure of the magazines in question. The magazines were admitted into evidence, and the jury was permitted to review several of them under a cautionary instruction.

The State presented the testimony of Dr. Michael Chiapetta, a licensed psychologist and social worker. In his opinion, the magazines lacked value, and their effect on the average adult was unwholesome. The State also presented testimony that the magazines had no literary value and no serious value in the field of fine arts.

Defendant presented no evidence.

At the conference on jury instructions, the State offered an instruction which would permit the jury to find the defendant guilty of obscenity if they found a single magazine to be obscene. The defendant tendered instructions which would require that the jury find all of the charged magazines obscene in order to find the defendant

guilty of obscenity. The trial court ruled that the State could proceed in a single count for as large a number of magazines as it chose and could obtain a conviction regardless of a finding by the jury that some magazines were not obscene and thus, constitutionally protected. Over defendant's objection, a special interrogatory was given to the jury which required the jury to answer "yes" or "no" as to the obscenity of each magazine on trial. General verdict forms were also given to the jury.

The trial court denied defendant's motion for a directed verdict at the close of the State's case in chief. The motion was renewed after the defendant presented no evidence. Both motions were denied.

The jury returned a general verdict finding defendant guilty of obscenity. The special interrogatory was completed finding 160 magazines obscene and 6 not obscene.

Defendant's post-trial motion was denied, and defendant was sentenced to pay a fine and court costs. This appeal followed.

Defendant contends, first, that the search warrant procedure utilized in this case did not meet the strict requirements necessary when first amendment freedoms are implicated, in that the search warrant applications and supporting documents failed to meet the standard of probable cause; the search warrant was overly broad and allowed the seizure of protected, as well as unprotected material; and the warrant process itself was designed to do economic harm to the operation of defendant's bookstore.

Defendant concedes that this court's opinion in *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, and *People v. Patroff* (1986), 141 Ill. App. 3d 483, *cert. denied* (1986), — U.S. —, 93 L. Ed. 2d 177, 107 S. Ct. 251, are dispositive of all of the issues raised in this case regarding the search warrant. Nevertheless, defendant urges this court to reconsider our decisions in those two cases. However, we decline to do so. *People v. Sequoia Books, Inc.* (1987), 160 Ill. App. 3d 315.

Next, defendant contends that the Illinois Obscenity Statute (Ill. Rev. Stat. 1985, par. 11-20) is fatally defective because it fails to define "prurient interest," and thus on its face permits the prosecution of indecent or lustful materials. Defendant relies on *Brockett v. Spokane Arcades, Inc.* (1985), 472 U.S. 491, 86 L. Ed. 2d 394, 105 S. Ct. 2794. However, in *Sequoia Books, Inc.*, 160 Ill. App. 3d at —, this court distinguished *Brockett* on the basis that in that case, the statute in question provided a definition of "prurient interest" whereas the statute in Illinois does not provide any definition of the term. Moreover, the court in *Brockett* held that the failure to provide a definition was not a satisfactory ground for striking down the statute. We conclude therefore that the Illinois Obscenity Statute is not defective. See *Sequoia Books, Inc.*, 160 Ill. App. 3d at —.

Next, defendant contends that the trial court erred in refusing several of defendant's jury instructions. Defendant argues that the trial court erred in refusing to instruct the jury as follows:

> "With respect to each magazine, if you find an element of the tripartite test for obscenity is not proved

by the evidence, you may not find the magazine to be legally obscene."

The above instruction was a non-IPI instruction. A non-IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject that the jury should be instructed on, and if the tendered non-IPI instruction is simple, impartial, and free from argument. (*Sequoia Books, Inc.*, 145 Ill. App. 3d at 1064.) The trial court, however, did give the following modified IPI instruction which was tendered by the State:

"A magazine is obscene if:

1. the average person, applying contemporary community standard, would find that the work, taken as a whole, appeals to prurient interest; and

2. the average person, applying contemporary adult standard, would find that it depicts or describes, in a patently offensive way ultimate sex acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and

3. taken as a whole, it lacks serious literary, artistic, political or scientific value.

In determining whether a thing is obscene, your are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by people in any single city or town or region within the State."

We agree with the State that no error occurred as a result of the refusal of defendant's instruction. Defendant's instruction was repetitious in light of the State's instruction (see *People v. Schabatka* (1974), 18 Ill. App. 3d 635), and confusing, in that it referred to "the tripartite test for obscenity," but the test was not contained in the instruction.

Defendant also argues that the context of the dissemination of the materials in question is a factor for the jury to consider in determining whether or not a magazine offends contemporary community standards, and that, therefore, the trial court erred in refusing to give the defendant's instructions as to context.

In *Sequoia Books, Inc.*, 160 Ill. App. 3d at —, this court held that a similar instruction was properly refused as it unduly underscored the importance of one piece of evidence. Moreover, in this case, defendant chose not to put on any evidence. We are aware that at least one other jurisdiction has taken the position that it is error not to instruct the jury to consider the context of the dissemination (see *Commonwealth v. Dane Entertainment Services, Inc.* (Mass. App., 1985), 476 N.E. 2d 250, *aff'd* 490 N.E. 2d 783); however, we have found no authority for such a view in Illinois. We conclude, therefore, that the defendant's instructions as to context were properly refused.

Next, defendant contends that the combining of 166 separate charges of obscenity into a one count complaint, and the use of a special interrogatories were improper. However, in *Sequoia Books, Inc.*, 160 Ill. App. 3d at —, both the use of the single-count complaint and the special interrogatory under almost identical circumstances was approved by this court, and therefore, no error occurred.

Next, defendant contends that the prosecutor made prejudicial comments in closing which resulted in the defendant being denied a fair trial. The complained of remarks are as follows:

"Sequoia Books, operated as the Denmark Bookstore, by offering obscene material for sale, is offering those

> into the stream of commerce just like the 7-Eleven offers pop, gum, magazines and newspapers. There is no sign above those doors that you can't take that material out of this bookstore, that you have to read it here. When these materials are offered for sale, they are offered for sale. Don't be misled by the fact that the bookstore attempts to present a picture that they are very selective about who this material is offered to. Why do you think they have to do that? Why does their bookstore run any different than a Kroch and Brentano's where anybody can walk in? It's because they are offering obscene material for sale."

Defendant objected to the statement on the basis that the remarks were inaccurate and not based upon the law. The objection was overruled. Later, counsel for the defendant made a motion for mistrial based upon the same remarks. That motion was denied as well.

Defendant argues that the prosecutor's remarks inferred to the jury that by law, a bookstore must limit the age of its patrons when selling sexually explicit material; that since there is no such requirement under Illinois law, the prosecutor's remarks amounted to a misstatement of the law requiring a reversal of defendant's conviction, and a remand for a new trial. See *People v. Eckhardt* (1984), 124 Ill. App. 3d 1041.

First, we are not convinced that from the above-quoted remarks, the jury would infer that the defendant was under a legal obligation to limit access to the bookstore to 18 year olds or older, thus amounting to a misstatement of the law as defendant suggests. Second, the context of the statement shows that it was made in response to defendant's description of the precautions taken to prevent

the material from falling into the hands of minors or more sensitive readers. (See *People v. Holman* (1984), 103 Ill. 2d 133.) Third, even if we were to conclude that the remarks were improper, defendant has failed to demonstrate to this court that the jury's verdict would have been different in the absence of the complained of remarks. *People v. Smith* (1972), 6 Ill. App. 3d 259.

Finally, defendant contends that it was not found guilty beyond a reasonable doubt, because the State did not present any evidence regarding contemporary community standards. Defendant concedes that in this court's opinion in *People v. Hall* (1986), 143 Ill. App. 3d 766, we permitted a verdict to stand on the basis of a magazine itself. Although the defendant urges a reconsideration of our decision in that case, we decline to do so.

The judgment of the circuit court of Kendall County is affirmed.

WOODWARD, NASH and REINHARD, JJ.

EXHIBIT B

ILLLINOIS SUPREME COURT
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SUPREME COURT BUILDING
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66870

June 3, 1988

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No. 66870—People State of Illnois, respondent, v. Sequoia Books, Inc., petitioner. Leave to Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1988.

EXHIBIT C

GENERAL NO. 66870

IN THE SUPREME COURT
OF THE
STATE OF ILLINOIS

	) Appeal from the
	) Appellate Court
PEOPLE OF THE	) for the Second
STATE OF ILLINOIS,	) District
	) No. 2-87-0053
Plaintiff-Appellee-	)
Respondent,	) From the Circuit
	) Court of the 16th
vs.	) Judicial Circuit,
	) Kendall County,
SEQUOIA BOOKS, INC.,	) Illinois
	) Trial Court
Defendant-Apellant-	) No. 86-CM-104
Petitioner.	)
	) Honorable
	) Wilson Burnell
	) Judge Presiding

ORDER

(Filed June 14, 1988)

THIS MATTER coming on for consideration on the motion of petitioner to stay the mandate of this court pending an application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of an application for *certiorari* or the expiration of the period within which said application may be filed. If *certiorari* is applied for, and mandate of this court shall, upon proof of

such filing being made by affidavit filed with the Clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which *certiorari* may be sought.

/s/ Thomas Moran
JUSTICE, SUPREME COURT
OF ILLINOIS

EXHIBIT D

Illinois Obscenity Statute
Ill.Rev.Stat. (1985) ch. 38, ¶ 11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers, or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participate directly in that portion thereof which make it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertise or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, education or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possesson of such materal.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT E

Ill. Rev. Stat. Ch. 38, ¶ 11-20 (1985)
(As revised effective 1/1/86)

11-20. *Obscenity*

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to

the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibit of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific values.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistics, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such materal.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

Supreme Court, U.S.
FILED
OCT 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the search warrant comply with constitutional authority? Were the officers limited to seizing only magazines that portrayed specifically described sexual acts? Was there a prior restraint? Is there any conflict between the Illinois Appellate Court opinion and decisions from the Courts of Appeals?

2. Did the procedure which provided special interrogatories to assure that single general verdict was based upon specific consideration of all the magazines comply with constitutional authority? Did this procedure affect the independent function of the jury? Did it actually benefit petitioner?

3. Is the Illinois statute invalid for providing no definition of the term "prurient"?

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No. 88-198

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Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The State of Illinois asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, insofar as the defendant does not raise any issues worthy of review.

OPINION BELOW

The opinion below, dated March 9, 1988, in cause No. 2-87-0053, is uncited pursuant to Illinois Supreme Court Rule 23. A copy is reprinted in petitioner's appendix.

STATEMENT OF THE CASE

Defendant Sequoia Books, Inc. owns and operates the Denmark Bookstore in Aurora, Illinois. It was charged by complaint May 13, 1986, with one count of obscenity for selling obscene material in Kendall County, Illinois, and found guilty after a jury trial. Defendant was sentenced to a fine of $1,000 and costs of $208.

The charge of obscenity arose after a Kendall County judge issued a search warrant, supported by an affidavit of a police officer and by three magazines that had been purchased at the store. The affidavit said that: the officer visited the bookstore; he purchased three magazines entitled Anal Climax No. 3, HOM Video Number 1, and Pussy Polking; each magazine depicted more than one sexual act such as cunnilingus, fellatio, analingus, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of tongue into anus, and depiction of male or female persons with genital or breasts being fettered, bound or otherwise physically restrained, insertions of objects into penis or anus; during thirty minutes in the store he observed several hundred magazines many of which, if not all, depicted these same acts and all of which were offered for sale to the public. Pursuant to the warrant which limited seizure to maga-

zines portraying specifically described sexual acts, authorities seized 166 magazines.

Defendant pled not guilty and moved to quash the search warrant and to suppress evidence on the basis of the first, fourth, and fourteenth amendments. Defendant also moved to dismiss the count on two bases: that it was improper to include a large number of magazines in a single count and that the new Illinois Obscenity Statute was without any defintion of the phrase "appeal to prurient interest." After hearings on the motions, they were denied.

At trial, the parties stipulated that defendant owned and operated the Denmark Bookstore and offered the charged magazines for sale on the date in question, knowing the nature and contents of the magazines. The State offered testimony from the police officers regarding the seizure of the magazines. The magazines were admitted into evidence and the jury reviewed several of them under a cautionary instruction. The State offered expert testimony of a licensed psychologist and social worker that the magazines lacked value and had an unwholesome effect on the average adult. It also presented testimony that the magazines had no literary or artistic value.

Defendant did not present any evidence on its own behalf.

At the jury instruction conference, the State tendered an instruction permitting the jury to find defendant guilty if it found a single magazine obscene. Defendant tendered an instruction requiring the jury to find all charged magazines obscene before finding defendant guilty. The trial court gave the State's instruction, explaining that the State could proceed on a single count for as large a number of magazines as it chose and obtain a conviction regardless of a finding by the jury that some magazines were not obscene.

Also, over defense objection, the jury was given general verdict forms, along with special interrogatories requiring the jury to answer "yes" or "no" as to the obscenity of each of the magazines. The jury found 160 magazines obscene and six not obscene.

On direct appeal, petitioner raised numerous allegations of error, including the claims he raises in his petition to this Court.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS.

Defendant alleges two reasons why this Court should review the search warrant procedure in this case: 1) this Court must correct constitutional error that occurred within that procedure and 2) it must resolve a conflict in the law regarding search warrants in first amendment cases. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. Despite defendant's claim to the contrary, the search warrant procedure was consistent with the special first amendment requirements outlined by this Court in *New York v. P.J. Video*, 475 U.S. 868 (1986). *P.J. Video* requires that, before authorizing the seizure of materials presumptively protected by the first amendment, the magistrate

must make sure that the warrant application is supported by affidavits setting forth specific facts. This requirement enables the judge to focus searchingly on the question of obscenity. Furthermore, the police may not dispense with the warrant requirement, as they ordinarily could in exigent situations, whenever this would constitute a prior restraint. If a defendant meets a burden of making a pretrial showing of a "substantial" prior restraint, then a large-scale seizure must be preceded by a hearing on the obscenity question before the search can take place.

But aside from these, warrant applications for seizures of allegedly obscene magazines are the same as those applied generally. The magistrate must apply a uniform standard of probable cause: a probability or substantial chance of criminal activity; not an actual showing.

The principles of *P.J. Video* were followed by the issuing magistrate in the cases at bar. The judge who issued the warrant searchingly focused on the obscenity of the magazines to be seized. The judge made sure that the warrant application was supported by an affidavit describing the context in which certain magazines were displayed in the Denmark Bookstore and particularly describing specific sex acts depicted in them. Several magazines purchased from the store were provided to the issuing magistrate for his review. This gave the judge the opportunity to determine that there was a probability of criminal activity occurring in the bookstore, namely the sale of magazines not protected by the first amendment. The judge therefore issued a warrant authorizing officials to seize only other such magazines.

The warrant was not a broad one which left total discretion to the executing officers. Rather, the officers were limited to seizing only the magazines that portrayed the sexual acts specifically described on the warrant.

Nor is there a system of prior restraint in place in Kendall County. According to *P.J. Video*, a prior restraint occurs only when the police rely on exigent circumstances and make a large-scale seizure without a warrant. But there is no prior restraint so long as the police first obtain a warrant. There was no prior restraint in this case since defendant never showed a "substantial" prior restraint. Indeed, there is no evidence that defendant was in any way economically harmed, that the police seized any more than a single copy of each magazine, or that the store was closed down. Rather, it appears from the record that some magazines were seized for evidentiary purposes and the store continued to operate throughout the entire prosecution.

Similar warrant procedure was upheld in *People v. Sequoia Books*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *People v. Sequoia Books*, 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *People v. Sequoia Books*, 150 Ill. App. 3d 211, 501 N.E.2d 856 (2nd Dist. 1986), *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. denied October 3, 1988, No. 87-1646), and *People v. Sequoia Books*, No. 2-86-1030 (1987) (cert. denied October 3, 1988, No. 87-1975). Therefore, defendant has failed to show the existence of a constitutional error that needs correction by this Court.

Defendant also claims that the Illinois Appellate Court's refusal to condemn these warrants as general warrant cannot be squared with two cases from the Courts of Appeals, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). But, in fact, there is no conflict between these cases and the Illinois Appellate Court opinion. These opinions agree that a search warrant must define what is to be seized with specificity so that the executing officer may not exercise judgment when making seizures and that

probable cause for a warrant requires that the materials first be viewed.

In *Guarino*, specificity was lacking because the warrant authorized nothing more specific than the seizure of "obscene materials," leaving it to the officer's opinion to decide what is obscene. *Guarino*, 729 F.2d at 865, 867. But specificity was not lacking in this case. The warrant authorized the officers to seize only those magazines depicting specifically defined acts. The warrants at bar contained the specificity found lacking in *Guarino*.

In *Tupler*, probable cause was lacking because the State did not view the alleged obscene films nor tender them to the issuing judge for review, but assumed they were obscene from film packaging. *Tupler*, 564 F.2d at 1297. But probable cause was not lacking in this case. The affidavit of the investigator demonstrated that he himself spent thirty minutes in the Denmark Bookstore where he observed hundreds of magazines, noted how the magazines were displayed, and he particularly described the specific sex acts that he saw depicted in them. The issuing magistrate also had the opportunity to observe several of these same magazines. The warrants at bar were based on the probable cause that was lacking in *Tupler*.

II.

THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER.

Defendant asks this Court to review the procedure seeking a single conviction based on numerous magazines because he says it resulted in constitutional error. He claims

that the single count method denied the jury the opportunity to specifically consider each magazine and created the probability that no twelve jurors unanimously agreed upon the obscenity of any one magazine.

However, constitutional error did not occur here. Illinois sought a single conviction for obscenity based on any of 166 individual magazines. To assure that all twelve jurors gave specific consideration to all the material, the jurors were required to answer special interrogatories as to the obscenity of each separate magazine. This procedure was earlier approved in Illinois in *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. denied October 3, 1988, No. 87-1646), and *People v. Sequoia Books*, No. 2-86-1030 (1987) (cert. denied October 3, 1988, No. 87-1975).

This Court saw in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 1362 (1969), that in some circumstances a general verdict can present a problem. Thus, in *Street*, the validity of a general verdict for flag desecration was questionable where there was no way to know from the record whether it was based on the permissible ground of burning the flag or the impermissible ground of speaking contemptuously about the flag or an impermissible combination of both. But that problem was eliminated at bar by the giving of special interrogatories. This procedure assured that each member of the jury specifically considered each magazine and reached unanimous agreement upon each magazine before finding any single magazine to be obscene. The jury unanimously agreed that 160 of the magazines were obscene and supported its single verdict whereas six magazines were not obscene.

The procedure created several additional advantages here, as well. It reduced the vast number of instruction and verdict forms that would have otherwise been necessary, it made it possible to return the non-obscene books to the defendant, and it lessened the collective impact of

the material because the jury did not have to find defendant guilty of 160 offenses. It exposed defendant to only one obscenity conviction, rather than 159 additional convictions.

While it is true that special interrogatories are not generally given in criminal trials, the Constitution does not forbid them. *See Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974). They are suspect only insofar as they may jeopardize the independence of the jury by coloring its decision-making process with a step-by-step series of questions inexorably leading it to conclude that a defendant is guilty. *Heald*, 505 F.2d at 1246; *United States v. Spock*, 416 F.2d 165, 182 (1st Dist. 1969). Where they do not impair the jury's independent function and actually benefit a defendant, their use will survive a constitutional challenge. *Heald*, 505 F.2d at 1246.

Here, the special interrogatories imposed no special burden on the jury. The jury was duty bound to examine each magazine and the special interrogatories assured that it met its duty. Had the jury been instructed in the manner requested by defendant, its function would have been identical: to examine each magazine and determine whether or not it was obscene. Moreover, as already explained, defendant actually benefited in several material ways from this procedure. The procedure here survives constitutional challenge. No constitutional error occurred.

III.

THE ILLINOIS STATUTE IS NOT INVALID FOR FAILING TO PROVIDE A DEFINITION OF "PRURIENT."

Defendant asks this Court to hold the Illinois Obscenity statute unconstitutional for failure to provide any definition of the term "prurient" and thus being in conflict with this Court's decision in *Brockett v. Spokane Arcades, Inc.*,

472 U.S. 491, 105 S.Ct. 2794 (1985). In *Brockett*, this Court held that the definition of "prurient" provided in a Washington obscenity statute swept too broadly. However, this Court need not intervene since neither *Brockett* nor any constitutional authority requires a definition of the term "prurient."

The Illinois statute defines obscenity as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions, or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

Ill.Rev.Stat. ch. 38, §11-20(b) (1987).

This definition is virtually a word-for-word copy of the definition this Court provided in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). In fact, the legislative debates indicate that Illinois' obscenity definition is meant to be totally compatible with the holding of *Miller v. California*. (P.A. 84-709, Section 1, 84th Gen. Ass., 1985; Senate Debates, 84th Gen. Ass., May 8, 1985, pp. 138-139; House Debates, 84th Gen. Ass., June 24, 1985, pp. 160-164).

The term "prurient" is not specifically defined. Rather, it appears in the same way it appears in *Miller*. In footnote 13 of *Brockett*, this Court noted that obscenity statutes which leave the term undefined or which define it only by case law have been upheld. In fact, in most states the term "prurient" is not defined, but this had not ren-

dered the statutes invalid. *Brockett*, 105 S.Ct. at 2802, n.13. *Brockett* contemplates only that, where a state does undertake to define the term "prurient," it may not do so in a way that includes a normal interest in sex.

The Illinois statute is clearly constitutional under *Miller* and *Brockett*.

CONCLUSION

Wherefore, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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